82-1261

No.

In the Supreme Court of the United States

October Term, 1982

STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), permits the National Labor Relations Board (Board) to bypass the secret ballot election process provided in the National Labor Relations Act (Act), and to instead issue bargaining orders "in less extraordinary cases marked by less pervasive practices" without the Board first making a specific analysis of the effectiveness of traditional remedies, the likelihood of recurring employer misconduct, and the residual impact of past employer misconduct on the election process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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The petitioner, Standard-Coosa-Thatcher Carpet Yarn Division, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 691 F.2d 1133, and is reprinted in the Appendix at pages A1-A26.[1] The decision and order of the Board are reported at 257 N.L.R.B. No. 45, and are reprinted in the Appendix at pages A28-A107.

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1. References to the opinions below are designated by "A," followed by the appropriate Appendix page number.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1982. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 23, 1982. (A27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act (Act) (29 U.S.C. § 151 *et seq.*) are as follows:

1. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Section 10(c) of the Act (29 U.S.C. §160(c)) provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

3. Section 10(e) of the Act (29 U.S.C. §160(e)) provides in pertinent part:

> The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.

4. Section 10(f) of the Act (29 U.S.C. § 160(f)) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon

filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

In 1979, the Amalgamated Clothing and Textile Workers Union, AFL-CIO (union) began an organizational campaign at the petitioner's plant in Boaz, Alabama. On March 20, 1979, the union filed a petition for election with the Board, seeking representation of the petitioner's production and maintenance employees. On May 18, 1979, pursuant to a Stipulation for Certification Upon Consent Election, the Board conducted a secret ballot election which the union lost. (A43). The union filed objections to the election, claiming that illegal employer activity during the organizational campaign undermined the union's majority.

The Board concluded that the petitioner had engaged in conduct during the campaign which violated sections 8(a)(1) and 8(a)(3) of the Act, and imposed traditional remedies for these violations. (A35-A37). Based on these same findings, the Board further concluded that the petitioner had violated section 8(a)(5) of the Act, and ordered the petitioner to bargain collectively with the union. (A31-A33). In so doing, the Board justified its imposition of

a bargaining order by a statement which listed the unfair labor practice findings and concluded, "[b]ased on the foregoing, and the entire record in this case, we are persuaded that the Respondent's unlawful activities warrant a bargaining order under *Gissel*." (A33).

On review, the Fourth Circuit Court of Appeals, by a vote of two to one, enforced the Board's order entirely except for a finding of a single section 8(a)(1) violation. (A23).[2] With respect to its enforcement of the bargaining order, the court perfunctorily relied on its obligation to defer to the Board's choice of remedies, and held that the Board's "statement of reasons is sufficient to permit review." (A22-23). The dissenting judge, following the rule in the Fourth Circuit as announced in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979), found that the Board had not supported the issuance of the bargaining order because it had failed to undertake an adequate analysis of the *Gissel* criteria. (A24-26).

The Fourth Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc, with three judges dissenting from the denial of a rehearing en banc, and one judge dissenting from the denial of rehearing. (A27).

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2. Jurisdiction in the court of appeals was based on 29 U.S.C. §§ 160(e) and (f).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's Decision So Far Departs From This Court's Rule In NLRB v. Gissel Packing Co. As To Warrant Review

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court identified three categories of unfair labor practice cases and established that the Board may impose bargaining orders in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process . . . where there is also a showing that at one point the union had a majority." 395 U.S. at 614. Although the Court provided for the imposition of bargaining orders in these so-called Category II cases, it maintained "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," and that in these cases "effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior." *Id.*

Thus, this Court provided in *Gissel* that within the context of the preference for secret ballot elections and the importance of employee free choice, the Board can issue bargaining orders, but the Court's allowance to the Board's discretion in such matters was tempered by the admonition that in the exercise of that discretion the Board:

> can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. *If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the*

> *use of traditional remedes, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.* 395 U.S. at 614-15. (Emphasis supplied).

Thus, the Court defined the scope of the Board's discretion in issuing bargaining orders. The Court counseled that reviewing courts must give "special respect" to the Board's choice of remedies pursuant to these directions by the Court. *Id.* at 612, n. 32.

What the Fourth Circuit has misinterpreted, in its perfunctory deference to the Board's choice of remedies in the instant case, is the scope of the Board's discretion to impose bargaining orders which this Court defined in *Gissel.* Although *Gissel* requires that reviewing courts give special respect to the Board's exercise of discretion in its choice of remedies, *Gissel* defines the scope of that discretion regarding the choice of a bargaining order by setting out what criteria the Board must consider and what findings the Board must make to justify its exercise of discretion to impose a bargaining order. The Fourth Circuit, in this case, has deferred to an exercise of discretion by the Board which *Gissel* did not confer—the discretion to choose a bargaining order without satisfying the *Gissel* requirements. Such deference undermines the integrity of the administrative process and so far departs from this Court's rule in *Gissel* so as to require review by this Court.

The Fourth Circuit's Decision Is In Direct Conflict With The Decisions Of Other Courts Of Appeals

Since this Court's decision in *Gissel,* the courts of appeals have repeatedly demanded that the Board provide an analysis of bargaining order cases according to the *Gissel* criteria in order that the courts could review the

propriety of bargaining orders. But the Board has consistently failed to comply with that direction. As the Seventh Circuit observed,

> even a cursory examination of the decisions applying *Gissel* in this circuit and in other circuits reveals that the Board has declined repeatedly to assist the courts with [its] expertise by revealing reasons for issuing *Gissel* bargaining orders. * * * It is unfortunate that this fundamental question of employee representation should receive so little attention from the Board . . . . *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 508-09 (7th Cir. 1980).

As a consequence of the Board's persistent failure to provide this analysis, some courts of appeals have assumed the obligation of conducting the *Gissel* analysis themselves while other courts of appeals have refused to infringe on the Board's province to decide, based on its expertise, what remedies are appropriate,[3] and have remanded those cases to the Board for findings, often without success. *See, e.g., NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979); *NLRB v. Appletree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982). Other courts have accepted the choice

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3. The question of whether a reviewing court may undertake to provide an analysis of the *Gissel* criteria in reviewing the Board's imposition of a bargaining order is fairly a subsidiary question of the issue presented in this petition, because the courts of appeals which have reviewed bargaining orders in cases in which the Board has not supplied a detailed analysis have generally either buttressed the Board's conclusion with additional analysis or undertaken to review the merits of such cases independently, in accordance with their formulations of the *Gissel* analysis. *See, e.g., Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980). As Judge Garth explained in his dissent in *NLRB v. Eastern Steel Co.*, 671 F.2d 104, 114 (3d Cir. 1982), such *post hoc* rationalizations conflict with the principles of review established by this Court in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

of a bargaining order by the Board and enforced bargaining orders without the benefit of such an analysis, holding that *Gissel* requires deference to the Board's choice of remedies, as the Fourth Circuit did in this case. This conflict points up a recurrent issue in the review of bargaining order cases by the courts of appeals, and the inconsistency among the courts of appeals, and the attendant inconsistency of results in the administration of the Act clearly illustrate the need for a final resolution of the issue. Accordingly, review by this Court is clearly warranted.

The conflict among the courts of appeals is whether the Board must provide an analysis of the *Gissel* criteria in a Category II case, and, if so, what constitutes a sufficient analysis. The Fourth Circuit held in this case that the Board's recitation of the unfair labor practices which it found, combined with the observation that these violations " 'commenced immediately after the Union began the organization drive and continued unabated right up to the election and even after the election' " constituted a sufficient statement of reasons to support a bargaining order under *Gissel* and to permit review of that order. (A22).[4]

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4. The court also provided a brief analysis of its own to buttress the Board's conclusion that a bargaining order was appropriate, relying on the statement of the Second Circuit in *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980), that certain "hallmark violations" are generally recognized " 'to have a lasting inhibitive effect' " on employees, and would generally support the issuance of a bargaining order without extensive explication by the Board, if there were no mitigating factors. (A22-23). The court did not, however, go on to determine whether the Board had analyzed the effect or ascertained the existence of any mitigating circumstances, which it had not, and the court did not do so independently. Thus, the Fourth Circuit's decision in this case sanctions an even greater departure from *Gissel* than other courts have allowed, and therefore presents a compelling issue for review. *See NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094 (7th Cir. 1982). This action by the court raises the subsidiary issue of the province of the reviewing court. *See* note 3, *supra*.

The court held that *Gissel* requires deference to the Board's expertise in fashioning remedies, and deferred to that expertise in enforcing the bargaining order in this case, without requiring that the Board conduct the analysis required by *Gissel*.

Although the factual contexts of bargaining order cases differ widely because of the Board's inconsistency in its explanation and imposition of bargaining orders, the Fourth Circuit's statement of the requirements of *Gissel* is generally consistent with decisions in the Second, Third, Fifth and Eighth Circuits. The Second Circuit, in *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980) and *Coating Products, Inc. v. NLRB*, 648 F.2d 108 (2d Cir. 1981), held that "hallmark violations" can support the issuance of a bargaining order without extensive explication, but the court also cautioned that,

> We believe it important for the Board to give some indication of the reasoning behind its recourse to the extraordinary remedy of a bargaining order, with all its attendant risks. Failure to do so may tend to make routine a remedy that should remain exceptional. We think this should be avoided, and take this occasion to register our concern. 648 F.2d at 109.

The Third Circuit, in *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981), *cert. denied*, ... U.S. ....., 102 S. Ct. 432 (1982), stated that the Board must articulate the factors justifying the choice of a bargaining order over a new election, but held that an extensive list of factors by the administrative law judge was sufficient, without analysis, for this purpose if the "conclusion is inescapable." 657 F.2d at 512. *See NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982). The Fifth Circuit held, in *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 498 (5th Cir. 1980), that general findings by the Board do

not require setting aside a bargaining order where "the record substantially supports the Board's conclusions." *See Chromalloy American Corp. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *but see NLRB v. American Cable Systems, Inc.*, 414 F.2d 661 (5th Cir. 1969), and *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). Finally, in *NLRB v. Ely's Foods, Inc.*, 656 F.2d 290, 293 (8th Cir. 1981), the Eighth Circuit enforced a bargaining order without detailed findings by the Board. *But see Patsy Bee, Inc. v. NLRB*, 654 F.2d 515, 518 (8th Cir. 1981).

These decisions, which generally accord with the Fourth Circuit's rule in this case, are directly inconsistent with decisions in the First, Sixth, Seventh, Ninth, and Tenth Circuits, which have interpreted *Gissel* as requiring the Board to analyze and articulate the appropriateness of a bargaining order. The First Circuit, in *NLRB v. The American Spring Bed Mfg. Co.*,[5] 670 F.2d 1236, 1247 (1st Cir. 1982), held that, notwithstanding the Board's expertise in fashioning remedies, a bargaining order was unenforceable unless the Board specifically articulated

> precise reasons for concluding that: 1) the employer's unfair labor practices so undermined the union's majority that conducting a fair election would be unlikely; 2) the employer's unlawful conduct was likely to continue; and 3) the ordinary remedies of backpay, reinstatement and posting of notices would be inadequate to ensure a fair election.

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5. The unfair labor practices in *American Spring Bed*, in which the court refused to enforce the Board's bargaining order, 670 F.2d at 1249, were more serious and substantial than those found in this case, pointing up the unexplainable inconsistency of results in the administration of the Act resulting from the conflict among the courts.

See NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1979). The Sixth Circuit, in *United Services for Handicapped v. NLRB*, 678 F.2d 661, 664-65 (6th Cir. 1982), held that the court's usual deference to Board findings is lessened in bargaining order cases, and that bargaining orders would not be enforced where the Board made no detailed findings. *See NLRB v. Gibraltar Industries, Inc.*, 653 F.2d 1091 (6th Cir. 1981); *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280 (6th Cir. 1981); *NLRB v. Rexair, Inc.*, 646 F.2d 249 (6th Cir. 1981); *Donn Products, Inc. v. NLRB*, 613 F.2d 162 (6th Cir.), *cert. denied*, 447 U.S. 906 (1980).

In *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d at 1094, the Seventh Circuit held that the Board must make specific findings to support a bargaining order, and that "'[t]o be an unfair labor practice . . . conduct need not have as demonstrably severe an impact on employee rights as conduct requiring a bargaining order.'" *See Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *but see NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982). The Ninth Circuit, in *NLRB v. Davis*, 642 F.2d 350, 354 (9th Cir. 1981), held that the Board must make explicit, not perfunctory, findings to support a bargaining order, and that *Gissel* requires deference only upon such findings. *See NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148 (9th Cir. 1977). The Tenth Circuit, in *NLRB v. Miller Trucking Service, Inc.*, 445 F.2d 927, 931-32 (10th Cir. 1971), held that *Gissel* requires specific findings, not generalizations, to support a bargaining order. *See NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981).

In addition to the conflicts among the courts of appeals on this issue, as the dissenting judge in this case

pointed out, the decision in this case inexplicably conflicts directly with precedent in the Fourth Circuit on the same issue. (A25). In *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d at 996-97, the Fourth Circuit held that the Board cannot support a bargaining order with a recitation of pervasive and egregious unfair labor practices; rather the Board must make a "specific and detailed" analysis of the immediate and residual impact of the unfair labor practices on the election process, the likelihood of recurrence of such practices, and the potential effect of ordinary remedies. The court further held that "it is the impact of the violations . . . and not the violations *per se* that is important" to the bargaining order issue. *Id.* at 999. The Fourth Circuit reiterated this rule in *NLRB v. Appletree Chevrolet, Inc.*, 671 F.2d 838, 841 (4th Cir. 1982), in which it held that the Board must "make findings sufficient to establish . . . the continuing effects of the employer's misconduct and the ineffectiveness of the usual remedies. . . ." *Accord, J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 772 (4th Cir.), *vacated on other grounds*, ... U.S. ....., 102 S. Ct. 2112 (1982). In this case, the majority neither distinguished the *Appletree Chevrolet* cases nor overruled them; indeed, the majority opinion made no reference to those cases with respect to the bargaining order issue. The dissenting opinion, however, clearly points out that the instant case cannot be distinguished from the *Appletree Chevrolet* cases. (A25).

Not only is the decision in this case directly inconsistent with prior cases in the Fourth Circuit, but it is also directly inconsistent with a case in this same circuit published two months after this case. In *NLRB v. Maidsville Coal Company, Inc.*, ... F.2d ....., 111 LRRM 2888, 2891 (4th Cir. Nov. 15, 1982), the Fourth Circuit, citing *Appletree Chevrolet*, refused to enforce a bargaining order

because the Board failed to make specific findings, and characterized the Board's conclusory statement of reasons as a "talismanic invocation," which, "of course, [is] insufficient in this Circuit to sustain a bargaining order." The Court remanded the case to the Board for reconsideration in light of *Appletree Chevrolet*, and "further admonish[ed] the Board to consider our additional comments on the necessary analysis in Appletree II." (citation omitted) *Id.* at 2891 n. 5.[6] The *Maidsville Coal* opinion was authored by Judge Bryan, who dissented from the opinion in the instant case, following the rule of the *Appletree Chevrolet* cases. Thus, the different results in these cases clearly show that the administration of the Act can depend on the panel reviewing a Board decision, and this inconsistency and confusion within circuits illustrates the need for guidance.[7]

The stark inconsistency among the courts of appeals in the interpretation and application of *Gissel* presents a serious question about the administration of the Act by the Board and the courts, and not a mere semantical issue. The result of this inconsistent treatment of the issue is the creation of an unstructured, unreasoned body of precedent which confounds the development of labor law and inflicts very real practical consequences and inequities on employers and employees. Review by this Court is critical to a resolution of this issue.

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6. The Board has petitioned for a rehearing in *Maidsville Coal*, citing as the basis for its petition the irreconcilable conflict between the decision in that case and the decision in the instant case. Petition for Rehearing, and Suggestion for Rehearing In Banc at 1, *NLRB v. Maidsville Coal Company, Inc.*, No. 81-2155 (4th Cir. Nov. 26, 1982).

7. The Fourth Circuit is not the only circuit to show the effects of this inconsistency and confusion. The Third Circuit has repeatedly attempted to address the issue, but has had little success. *See NLRB v. Eastern Steel Co.*, 671 F.2d at 111 (Adams, J., concurring).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued.

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